



DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR HUMAN RESOURCES AND ADMINISTRATION
WASHINGTON DC 20420

June 27, 2017

HUMAN RESOURCES MANAGEMENT LETTER NO. 05-17-08

**Disciplinary and Major Adverse Action Procedures
(Title 38 Employees)**

1. Purpose. To provide guidance regarding the implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41), Title I, Section 101, “Establishment of Office of Accountability and Whistleblower Protection” and Title II, Section 208, of the “Time Periods for Review of Adverse Actions with Respect to Certain Employees.”

2. Background. In accordance with the Act, the timeline and procedures for processing disciplinary and major adverse actions involving Covered Employees appointed under the provisions of 38 U.S.C. § 7401(1) are modified herein. All other provisions of VA Directive and Handbook 5021, Part II remain applicable. If adverse actions based on conduct are taken pursuant to the Act, those actions and procedures to take those actions replace any conflicting provisions provided for in any applicable collective bargaining agreement. Additionally, in accordance with the Act, the discipline process for Supervisory Employees who have been determined to have committed a Prohibited Personnel Action under 38 U.S.C. § 731 is described herein.

3. Scope. These procedures apply to all VA employees appointed under the provisions of 38 U.S.C. § 7401(1), which includes full-time, permanent physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded function dental auxiliaries. It does not include Senior Executives as defined under 38 U.S.C. § 713(d)(3), including those appointed under 38 U.S.C. § 7401(1) if they are serving in an administrative or executive position as described in 38 U.S.C. § 713(d)(3)(B); or those employees appointed under the authority of 38 U.S.C. § 7405, including but not limited to part-time and intermittent nurses. Canteen employees are also excluded.

4. References.

- a. Title I, Section 101 and Title II, Section 208, of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41)
- b. VA Directive 5021, Appendices A and C
- c. VA Handbook 5021, Part II and Part V

5. Definitions.

- a.** “Act” refers to the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, (Public Law 115-41).
- b.** “Bargaining unit employee” means an employee who is covered by a collective bargaining agreement.
- c.** “Business days” refers to weekdays, which are Monday through Friday in Washington, D.C., except when such a day is designated as a Federal holiday by OPM.
- d.** “Covered Employee” means for purposes of this process an individual occupying a position appointed under the provisions of 38 U.S.C. § 7401(1), which includes full-time, permanent physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded function dental auxiliaries. It does not include Senior Executives as defined under 38 U.S.C. § 713(d)(3), including those appointed under 38 U.S.C. § 7401(1) if they are serving in an administrative or executive position as described in 38 U.S.C. § 713(d)(3)(B); or those employees appointed under the authority of 38 U.S.C. § 7405, including but not limited to part-time and intermittent nurses.
- e.** “Deciding Official” means those individuals delegated authority to decide an action as described in the Act in accordance with the provisions of VA Handbook 5021, Part II, Chapter 2.
- f.** “Decision” refers to a written memorandum from the Deciding Official to the Covered Employee that notifies the Covered Employee of the decision in response to the proposed disciplinary or major adverse action.
- g.** “OAWP” refers to the VA Office of Accountability and Whistleblower Protection, as represented by the Assistant Secretary for Accountability and Whistleblower Protection, or his or her designee.
- h.** “OGC” refers to the VA Office of General Counsel, as represented by the General Counsel, or his or her designee.
- i.** “OSC” refers to the U.S. Office of Special Counsel.
- j.** “PPA” refers to Prohibited Personnel Action, as described in 38 U.S.C. § 733(c) (to be renumbered to 38 U.S.C. § 731(c)).
- k.** “Preponderance of Evidence” means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

I. “Proposal” refers to the memorandum from the Proposing Official to the Covered Employee that notifies the Covered Employee of the disciplinary or major adverse action being imposed.

m. “Proposing Official” means those individuals delegated authority to propose an action as described in the Act in accordance with the provisions of VA Handbook 5021, Part II, Chapter 2.

n. “Supervisory Employee” means a Covered Employee who is a supervisor as defined in 5 U.S.C. § 7103(a)(10).

o. “Whistleblower disclosure” means any disclosure of information by a VA employee, or individual applying to become a VA employee, which the employee or individual reasonably believes evidences:

(1) a violation of a law, rule, or regulation; or

(2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

6. Procedures.

a. Disciplinary and Major Adverse Actions: In accordance with the Act, new timeframes and procedures have been established related to disciplinary and major adverse actions involving Covered Employees.

(1) The aggregate period for notice, reply, and decision on a proposed disciplinary or major adverse action, whether or not it involves a question of professional conduct or competence, may not exceed 15 Business days, even if an extension to the reply period is granted.

(2) The Proposing Official will provide the Covered Employee the Proposal, which includes the evidence file.

(3) The Covered Employee will have up to 7 Business days after receiving the Proposal to respond orally and in writing, including the submission of affidavits and other documentary evidence in support of the response, to the Deciding Official.

(4) Extensions to the 7 Business day reply period may be granted by the Deciding Official after consultation with OGC and, when applicable, OAWP. Extensions will be granted only in the most exigent circumstances, recognizing that the statutory requirement to issue a Decision within 15 Business days after issuance of the Proposal is still required if an extension to the reply period is granted.

(5) Not later than 15 Business days after the issuance of the Proposal, the Deciding Official shall determine whether the charge(s) are supported by a Preponderance of Evidence.

(6) The Decision will be issued on or before the 15th Business day after issuance of the Proposal to the Covered Employee.

(7) If the major adverse action involves a question of professional conduct or competence, the employee will be notified of his or her right to appeal the action to the Disciplinary Appeals Board so that it shall be received within 7 Business days by the Under Secretary for Health, as currently prescribed in VA Handbook 5021, Part V, after the date of service of the written Decision on the employee.

(8) For Bargaining unit employees, only the provisions of the applicable collective bargaining agreement that are inconsistent with the Act (e.g., the time lines and certain procedures) are superseded. Any questions regarding whether a provision in the applicable collective bargaining agreement conflicts with the Act should be directed to OGC.

b. Whistleblower Disclosure Retaliation: Upon conclusion of an investigation involving allegations of a Supervisory employee retaliating against another employee for making a Whistleblower disclosure, the OAWP will submit a recommendation to the Secretary for disciplinary action, if warranted, or "no action."

(1) Recommendation of Disciplinary Action. If the Secretary concurs with a recommendation for disciplinary action from the OAWP, the Proposing Official will review the available evidence, including the findings of any investigation, to determine whether a suspension, demotion, or removal should be proposed.

NOTE: 38 U.S.C. § 731 requires no less than a suspension of 12 calendar days and no more than a removal for the first offense as described in paragraph 6b(1) of this paragraph, and no less than removal for a second offense of same.

(2) Recommendation of No Action. A recommendation for "no action" may be made if all of the allegations against the employee are not substantiated.

(3) Any recommendation resulting in proposing a disciplinary action must be initiated no later than 60 calendar days after the Secretary receives the recommendation from the OAWP.

c. Inter-office Coordination: In cases involving alleged retaliation for making a Whistleblower disclosure, as described in paragraph 6b, the Proposing Official will work with the servicing Human Resources Office to draft a Proposal. The draft Proposal with

all the supporting evidence will be provided to OGC, the servicing Human Resources Office, and the OAWP for review and concurrence.

7. Adverse Actions against Supervisory Employees who Commit PPAs under 38 U.S.C. § 731

a. If a Supervisory Employee is determined by the Secretary, the Office of Inspector General , or unless the matter is still pending or under appeal, an administrative judge, the Merit Systems Protection Board, the OSC, an adjudicating body provided under a union contract, or a Federal judge, to have committed a PPA as described in 38 U.S.C. § 731 he or she will face the following proposed discipline:

(1) with respect to the first time such a determination has been made against the Supervisory Employee, a suspension of no less than 12 calendar days and not more than removal; and

(2) with respect to the second time such a determination has been made against the Supervisory Employee, removal.

b. A Proposal issued against a Supervisory Employee for a PPA, as determined in paragraph 7a of this letter, should state that the proposed discipline is taken under the authority in this policy, as amended by 38 U.S.C. § 731, and the 7 Business day timeframe for reply (as stated in paragraph 6a of this letter) for an action taken under this policy is amended to 10 calendar days.

c. For the purposes of paragraph 7:

(1) an “administrative judge” refers to an administrative judge of the Merit Systems Protection Board; and

(2) an “adjudicating body provided under a union contract” refers to an arbitrator who VA and a union have selected to adjudicate a matter described in 5 U.S.C. § 7121(f).

8. Questions. Questions concerning this HRML may be directed to the Director for Employee Relations and Performance Management Service (051), at VACO 051 ER&PMS OHRM (vaco051cacgohrm@mail.va.gov).

/s/ Peter J. Shelby

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